In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE SECRETARY OF AGRICULTURE OPPOSING MOTIONS TO AFFIRM

INTRODUCTORY STATEMENT

In compliance with Rules 7 (3) and 12 (3) of the Revised Rules of the Supreme Court of the United States the appellant Secretary of Agriculture (an intervening plaintiff in the Court below) submits this brief in opposition to the motions to affirm filed by the Interstate Commerce Commission and the intervening defendants.

This brief is supplemental to the Statement of the Secretary of Agriculture as to Jurisdiction

filed in this proceeding which sets forth in detail the position of the Secretary of Agriculture with respect to most of the contentions raised in the motions to affirm. The arguments advanced in the Secretary's jurisdictional statement are not repeated in this brief.

ARGUMENT

I

The Commission and the intervening defendants contend that the Secretary of Agriculture's assignment of error number 2—involving the issue as to whether unloading charges on fruits and vegetables at New York are an unjust discrimination or an undue or unreasonable prejudice or disadvantage in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other similar freight unloaded by the carriers at New York—was not litigated in the District Court and is not properly before this Court on appeal (Commission's motion, fn. 9; Intervening Defendants' motion, fn. 2). The appellees present no argument on the merits of this issue in support of their motions to affirm.

However this issue was litigated in the District Court and is properly before this Court on appeal. The Hearing Examiner for the Commission found that:

> "* * * respondents have continued to perform such unloading without charge in

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> respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3 (1) of the act."[1]

The Examiner concluded:

> "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3 (1) of the act."[2]

The complaint filed in the District Court by the Secretary of Agriculture, in addition to the general allegations that "the Commission erred in approving the continued imposition of unloading charges although reduced in measure"[3] and that "the Commission erred in summarily dismissing

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[1] Second Report on Further Hearing Proposed by M. J. Walsh, Examiner, p. 24.

[2] *Id.* at p. 25.

[3] Complaint, paragraph X (3).

the complaints in Nos. 31105 and 31106,"[4] quotes the conclusion by the Commission's Examiner that the unloading charges "are also in violation of section 3 (1) of the act."[5] The Commission expressly ruled on this issue in the administrative proceeding,[6] and these allegations in the complaint in the District Court, challenging the entire administrative action in this case, were sufficient to put the Commission and the intervening railroads on notice that the issue was in controversy in the District Court. All of the evidence received in the administrative proceeding in this case was certified to the District Court, and, therefore, all of the evidence with respect to this issue was before the District Court. The issue under sections 2 and 3 (1) of the Act was actually litigated in the District Court and is one of the bases for the dissenting opinion. Judge De Vane, dissenting, concluded that:

> "In my opinion the carriers not only failed to meet the requirements of Section 15 (7) of the Act, but the evidence in the case also clearly establishes a violation of Sections 2 and 3 (1) of the Act. Unloading is performed by the carriers of almost

[4] Complaint, paragraph X (4).

[5] Complaint, paragraph VIII.

[6] The Commission held that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act" (286 I. C. C. 119, 142).

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> all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3 (1) of the Act" (114 F. Supp. 420, 426).

There can be no doubt that this issue was before the District Court and was considered and resolved on the merits by the District Court. But assuming, *arguendo,* that the allegations in the complaint were not entirely explicit, in this respect, the "whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law. It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings." *Kuhn* v. *Civil Aeronautics Board,* 183 F. 2d 839, 841–842 (C. A. D. C.). Accord: *Labor Board* v. *Mackay Co.,* 304 U. S. 333, 349–350; *Pasquel* v. *Owen,* 186 F. 2d 263, 271 (C. A. 8); *Hutchins* v. *Akron,*

Canton & Youngstown R. Co., 162 F. 2d 189, 192 (C. A. 6).

Hence the issue under sections 2 and 3 (1) of the Act is properly before this Court on appeal. The Commission and the intervening railroads have failed to meet this argument set forth in the jurisdictional statement of the Secretary of Agriculture.

II

The other errors assigned by the Secretary of Agriculture are discussed in detail in the Secretary's jurisdictional statement, and the motions to affirm advance no relevant argument to the contrary. The Commission's main argument, in its motion to affirm, is that the "Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." But the Commission, in its motion to affirm, ignores the fact—discussed at length in the Secretary's jurisdictional statement—that the Commission did *not* make a finding that the carriers' transportation service ended prior to the unloading involved in this case or that the delivery of freight at New York and Philadelphia was not previously included in the line-haul rates.

To the contrary, the Commission found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed

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at a convenient location on the pier floor" (272 I. C. C. 648, 654–655; see also 286 I. C. C. 119, 125, 129, 133–139), and that the challenged charges are "for making delivery at New York piers" (286 I. C. C. 119, 129). The Commission concedes that for over 50 years the railroads have been compensated, either in whole or in part, for the transportation of fruits and vegetables to New York and Philadelphia, including delivery, by their line-haul rates.[7] Nonetheless in considering the reasonableness of the proposed charges *for making delivery* the Commission concedes that it did not consider the extent to which the line-haul rates adequately compensate the carriers for making delivery (286 I. C. C. 119, 140). Hence the Commission's action in approving the additional charges for making delivery is manifestly erroneous.

The intervening railroads state that "Plaintiff-Appellants assert that these unloading charges are improper because the unloading service precedes delivery." But that is not a correct statement of our position. The jurisdictional statement of the Secretary of Agriculture makes it plain that the "issues in this case relate primarily to the authority of the Interstate Commerce Commission to impose charges on shippers for

[7] See quotations from the Commission's report set forth in the Secretary of Agriculture's jurisdictional statement in the second paragraph under the heading "The Questions Are Substantial."

unloading fruits and vegetables at New York and Philadelphia without determining whether the total payment received by the railroads for such unloading is just and reasonable."

The Commission, in a case decided on June 29, 1953 (*Whitney-Apollo Corp. Terminal Services,* 289 I. C. C. 267, 274), reiterates the position of the appellants in this case that "transportation includes delivery; that whatever is essential to complete delivery the carrier must do; [and] that if it fails to make delivery and the consignee completes the work an allowance is due." But assuming, *arguendo,* that *for the future* the carriers can establish line-haul rates which do not include delivery, the decisive fact is that they did not do so in the past. For over 50 years, the line-haul rates involved have included delivery. Until the Commission determines *the extent,* if any, to which the carriers are not being adequately compensated under their line-haul rates "for making delivery" (286 I. C. C. 119, 129), the Commission cannot determine the extent to which an additional charge is warranted.

The intervening railroads suggest in their motion to affirm that "the Commission properly took the view that the line-haul rates could be presumed to be just and reasonable in the absence of a showing otherwise by the protestants." But this argument overlooks the fact that the line-haul rates, for over 50 years, included delivery at New York and Philadelphia, and, therefore, if any

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presumption is proper, it must be presumed that the line-haul rates are still just and reasonable for the transportation involved, including delivery. The statute places the burden of proof on the carriers to show that the proposed charges are just and reasonable (49 U. S. C. § 15 (7)). The carriers could not fulfill this requirement without showing the extent, if any, to which they are not adequately compensated under their line-haul rates for making delivery.

The intervening railroads also contend that if "Plaintiff-Appellants were serious in their belief that the publication of separate charges for unloading made the line-haul rates unreasonable, they could have filed a complaint attacking the line-haul rates under Section 13 (1)." But our position is that the unloading charges are illegal, and this proceeding presents that sharply chiseled issue. Judicial review may undoubtedly be had at this time with respect to the Commission's orders approving the unloading charges.

III

The Secretary of Agriculture assigned as error number 5 that the orders of the Commission, establishing identical unloading charges at New York and Philadelphia even though it is conceded by the Commission that unloading costs at Philadelphia are substantially lower than at New York, are not supported by substantial evidence and adequate findings. In its motion to affirm,

the Commission states that a separate charge for special sorting is made by the carriers at New York, but not at Philadelphia, and furthermore that "the record indicates the desirability of a parity of charges for unloading" at the two cities. However there is no evidence or finding that the cost of unloading and sorting at Philadelphia is as great as the cost of unloading at New York, and, moreover, there is no evidence or subsidiary findings to justify the Commission's assertion that "the record indicates the desirability of a parity of charges for unloading" at New York and Philadelphia. The Commission's finding, in this respect, is based solely upon an unsupported statement in a brief filed with the Commission by the railroads.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Statement of the Secretary of Agriculture as to Jurisdiction, it is respectfully submitted that the Court should deny the motions to affirm, and the appellant Secretary of Agriculture prays that the Court note probable jurisdiction.

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